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No. 80-2102

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

SHEILA RENDELL-BAKER,
Petitioner,

v.

SANDRA KOHN, ET AL.,
Respondents,

WAYNE KLUG, ET AL.,
Petitioners,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
Respondents

BRIEF OF RESPONDENTS BELLOTTI AND HIGHGAS

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QUESTION PRESENTED

Whether the dismissal of a teacher by a private school which contracts to provide special education in return for public funds is state action for purposes of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Prior Proceedings

Petitioner Sheila Rendell-Baker filed this action for injunctive relief and for damages on July 28, 1977, J.A. 6; P.A. 10,[1/] to redress her discharge as a teacher and vocational counselor at the New Perspectives School, Inc., a private secondary high school for students who have had difficulty completing an ordinary high school. P.A. 3. Violations of the First, Fifth, and Fourteenth

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1/ The abbreviations in this brief conform to those adopted by the Petitoners:

Appendix A to Petitioners' Brief	A.
Joint Appendix	J.A.
Petition for Certiorari Appendix	P.A.
Rendell-Baker Record	R.R.

Amendments to the United States Constitution and 42 U.S.C. §1983 (1976) were alleged on the basis that, among other things, Ms. Rendell-Baker was terminated without due process for exercising her right to free speech. J.A. 76-78; P.A. 2. The original defendants to this suit were New Perspectives School, Inc.; the Director and members of the Board of Directors of New Perspectives, individually and in their official capacities; Francis X. Bellotti, the Attorney General of the Commonwealth, solely in his capacity as Chairman of the Massachusetts Committee on Criminal Justice; Robert J. Kane, solely in his capacity as Executive Director of the Massachusetts Committee on Criminal Justice; and certain federal

officials, solely in their capacity as officials of the United States Law Enforcement Assistance Administration. J.A. 72.

On April 12, 1979, the district court allowed the federal defendants' motion to dismiss. J.A. 11; P.A. 10. William Highgas, Jr., defendant Kane's successor as Executive Director of the Committee on Criminal Justice, was subsequently added as a party defendant in substitution for defendant Kane. J.A. 14; P.A. 10; Fed. R. Civ. P. 25(d)(1).

Following extensive discovery, Bellotti and Highgas, who were defendants because of their involvement with the Committee on Criminal Justice, filed a motion for summary judgment which the

plaintiff Rendell-Baker opposed. J.A. 13; P.A. 10. This motion was allowed on April 16, 1980. J.A. 14; P.A. 10. Because the district court (Caffrey, C. J.) granted summary judgment on the basis of a conclusion that there was no state action involved in the firing of plaintiff Rendell-Baker, the case was ordered dismissed not only as to the moving state parties, but as to all remaining private defendants. Rendell-Baker v. Kohn, 488 F. Supp. 764, 767 (D. Mass. 1980); J.A. 14; P.A. 37-39. Summary judgment was affirmed by the United States Court of Appeals for the First Circuit in an opinion dated February 12, 1981. Rendell-Baker v. Kohn, 641 F.2d 14 (1st

Cir. 1981); J.A. 2; P.A. 1-26.[2/] On October 13, 1981, the Court granted the petition for a writ of certiorari to review this case, J.A. 2, notwithstanding the state defendants' argument that resolution of the case depends upon an application of settled legal principles

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2/ The First Circuit Court of Appeals consolidated with the Rendell-Baker appeal, an appeal of the denial of a motion to dismiss in a related case, Klug et al. v. New Perspectives School, Inc., et al., No. 80-1451 (P.A. 40-57). J.A. 4; P.A.2. The Klug matter also involved the dismissal of teachers from New Perspectives School but, unlike the Rendell-Baker case, did not name any state officials as defendants. J.A. 20-29; P.A. 11. In the same opinion that affirmed the judgment in Rendell-Baker, the court of appeals reversed the order of the district court (Mazzone, D.J.) denying defendants' motion to dismiss in Klug. J.A. 4; P.A. 26.

to a unique factual situation.[3/]

Statement of Facts

New Perspectives School, Inc. (New Perspectives) is a nonprofit Massachusetts corporation operating as a private secondary school for troubled students. J.A. 75; P.A. 3. The school is located on privately-owned property in the Town of Brookline, Massachusetts. P.A. 3. It is operated by a Board of Directors, no member of which is a government official or was chosen by any government official or governmental body. Id.

3/ The plaintiff-teachers in the Klug case joined Ms. Rendell-Baker in filing the petition for a writ of certiorari and a brief on the merits. This reply brief is limited to addressing arguments pertinent to the Rendell-Baker case, since respondents Bellotti and Highgas are not parties to the Klug case (J.A. 20-29).

Approximately fifty students attend the school on a tuition free basis. Id. While students could come to the school through private referral sources or on their own initiative, most are referred by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health or by local school committees under Chapter 766 of the Massachusetts Acts of 1972, Mass. Gen. Laws Ann. ch. 71B, §§1-14 (West Supp. 1981). J.A. 90; P.A. 3-4. This law (commonly referred to as Chapter 766) makes available to all special needs students in Massachusetts the opportunity to receive publicly-financed education programs designed to meet their needs. Mass. Gen. Laws Ann. ch. 71B, §§2-5 (West Supp. 1981); A. 3-10. The statute also sets

forth a process for evaluating and placing children with such needs in public or private schools. Id.

At the time Ms. Rendell-Baker was dismissed, New Perspectives received substantial government funding. J.A. 86; P.A. 4. The vocational education program out of which Ms. Rendell-Baker was paid was funded by the federal Law Enforcement Assistance Administration, J.A. 87; P.A. 4 n.4, 7, which channeled its funds through the Massachusetts Committee on Criminal Justice. J.A. 75, 92-104; P.A. 7. The school was also subject to various governmental requirements, J.A. 87, 90; P.A. 5-6, one minor example of which was approval by the Committee on Criminal Justice of staff

hiring in the school's vocational program. J.A. 105; P.A. 7. This prior approval was limited to reviewing resumes submitted by New Perspectives in order to ensure that applicants for vocational positions satisfied the qualifications proposed by the school. J.A. 105; P.A. 8. Neither Bellotti nor Highgas nor anyone else associated with the Committee on Criminal Justice interviewed applicants or exercised any subjective judgment in the hiring process, nor did they participate in or impose conditions upon the school with respect to termination of New Perspectives' employees. J.A. 106; P.A. 7, 25. Those matters were exclusively the province of New Perspectives School, Inc.

On January 3, 1977, Ms. Rendell-Baker was terminated from her position as voca-

tional counselor at New Perspectives by Sandra Kohn, Director of the school. J.A. 76. Ms. Rendell-Baker had been employed by the school for approximately one year from January, 1976, to January, 1977. J.A. 73-74; P.A. 8. Just prior to her termination, she had voiced support for reinstitution of a student-staff council through which students could participate in the school's personnel decisions. A. 8. Students had presented a petition seeking reinstitution of the council at a meeting of the school's Board of Directors and had encountered opposition from Director Kohn. Id.[4/]

4/ Respondents Bellotti and Highgas have no knowledge of these facts, but have accepted this account of Ms. Rendell-Baker's dismissal for purposes

(footnote continued)

Ms. Rendell-Baker's protest of her discharge prompted two discrete responses, one private and the other governmental. First, the school appointed a grievance committee to hear her grievances. A. 9. Second, a representative of the Committee on Criminal Justice sought, prior to approving a new candidate to fill Ms. Rendell-Baker's position, information concerning the rules and regulations under which the action was taken. Id. While the Committee did not have authority for exercising this oversight, P.A. 7, 25,[5/]

(footnote continued)

of their motion for summary judgment on the grounds that state action is lacking.

5/ See pp. 8-9 supra.

such a response was nevertheless provided, and the Committee indicated that it was satisfied.

SUMMARY OF ARGUMENT

This Court has previously articulated the standards against which the activities of private parties should be measured in seeking to equate that conduct with state action for purposes of applying the strictures of the Fourteenth Amendment. Ms. Rendell-Baker seeks a dramatic modification of those standards in at least three respects. First, her arguments would weaken the tradition and exclusivity components of analysis under the public function doctrine. Second, they would obviate the requirement that there be a sufficient

nexus between the challenged private conduct and the asserted public function. Third, her contention that a balancing of interests should apply to the threshold determination of state action threatens to eliminate the basic proposition that the Fourteenth Amendment does not apply to private conduct, however discriminatory or wrongful. In the three major subdivisions of this brief, the Respondents Bellotti and Highgas demonstrate that the modifications in standards sought by Ms. Rendell-Baker are inconsistent not only with the prior opinions of this Court, but also with the underlying principles of the Fourteenth Amendment.

Ms. Rendell-Baker contends that New Perspectives, a private high school for

troubled teenagers, is a state actor because it performs a public function in educating special needs children placed by local school committees and funded by public monies. This contention ignores the requirements discussed in Part I that a private entity must exercise a power traditionally and exclusively reserved to the State in order for state action to exist under the public function theory. Private activity which parallels a traditional state function, or which partially performs the function without wholly displacing it, does not give rise to state action under the public function doctrine.

Whether the asserted public function in this case is broadly defined as special education or limited to the

provision of Chapter 766 education by New Perspectives School, the required components of tradition and exclusivity are lacking. Private secondary schools providing special education have historically served as an alternative to the provision of special education by public schools. Indeed, prior to the enactment of the current version of Chapter 766, children with special needs were routinely excluded from public schools. Under the current version of the statute, parents still retain the prerogative to opt-out of the Chapter 766 program and enroll their children in private schools at their own expense, and private schools still play a role in providing state-subsidized education to special needs children through

contractual arrangements with cities and towns under the Chapter 766 program.

Nor has the private sector wholly displaced the public provision of special education. Private school placements are not favored under Chapter 766. As a result relatively few students are placed in private schools under the Chapter 766 program. Insofar as New Perspectives is concerned, Chapter 766 students do not constitute its entire student population; students may come to the school through private referrals or on their own initiative. New Perspectives therefore retains a private identity independent of its participation in the Commonwealth's Chapter 766 program. The provision of special education, then, both as a matter of history and

current practice, involves both public and private schools. One cannot consider New Perspectives nor any private provider of special education to be a state actor because it performs a public function without ignoring the twin requirements of tradition and exclusivity, previously imposed by this Court.

Part II assumes, for the purposes of argument, that New Perspectives does perform a public function in providing special education to students placed and funded by the Commonwealth and its political subdivisions. Even if this were the case, the school does not become a state actor for all purposes. Its status as a state actor would be limited to those matters which involve an exercise of this putative public function.

The termination of Ms. Rendell-Baker stemmed from advocacy of student participation in New Perspectives' hiring and firing of teachers. The termination was therefore unrelated to New Perspectives' contracted obligation to provide special education. Accordingly, the school cannot be said to be a state actor with respect to that termination unless the Court is willing to make private parties performing public functions answerable in the federal courts for all of their conduct.

Finally, while Petitioner Rendell-Baker advances a new theory of state action which incorporates a balancing of the interests competing in any particular case, it is submitted in Part III that such a balancing of interests

is inappropriate prior to a determination that public rather than private action exists. If a balancing of interests test has any place in Fourteenth Amendment analysis, it is only in deciding the merits of a claim. A threshold inquiry as to the presence of state action remains necessary in order to maintain the Fourteenth Amendment's "essential dichotomy" between deprivations by the State, on the one hand, and private conduct, on the other.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT APPLY TO THIS CASE BECAUSE NEW PERSPECTIVES IS A PRIVATE ENTITY WHICH DOES NOT PERFORM A PUBLIC FUNCTION.

Petitioner Rendell-Baker claims she was dismissed as a teacher and vocational education counselor at New Perspectives in violation of her rights to free speech and due process under the Fourteenth Amendment to the United States Constitution.[6/] In order to establish the federal court's jurisdiction over her Fourteenth Amendment claims, Ms. Rendell-Baker must demonstrate that the action

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6/ Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

of New Perspectives in terminating her employment "may be fairly treated as that of the State itself."[7/] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Such a demonstration is required because the Fourteenth Amendment does not address private conduct. Shelly v. Kraemer, 334 U.S. 1, 13 (1948). Accord, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961). See Part III infra.

7/ This is true whether the Petitioner grounds her claims directly on the Fourteenth Amendment in order to establish the court's jurisdiction under 28 U.S.C. §1331 (1976) or attempts to frame a cause of action under 42 U.S.C. §1983 (1976) in order to secure jurisdiction under 28 U.S.C. §1343 (1976). A. 72-73. See United States v. Price, 383 U.S. 787, 794 n.7 (1966).

Although this state action principle was first articulated in The Civil Rights Cases, 109 U.S. 3 (1883), its application to the infinite variety of relationships between private entities and the public sector has proven difficult. Burton, 365 U.S. at 723. Thus, the Court has adopted different modes of analysis in exploring state action questions. E.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (searching for nexus between state regulation of private utility company and utility's termination of service to one of its customers); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)(itemizing indicia of state insinuation into activities of private restaurant which leased space in

publicly-owned parking facility); Smith v. Allwright, 321 U.S. 649 (1944) (analyzing whether the Democratic Party's conduct of primary elections constituted the exercise of a public function). Petitioner Rendell-Baker patterns her claim of state action on the Smith v. Allwright approach, contending that New Perspectives is a state actor because it performs a public function in educating special needs children placed by local school committees and funded by public monies pursuant to Chapter 766. For the following reasons, Petitioner Rendell-Baker errs in concluding that New Perspectives' contractual involvement in the Commonwealth's Chapter 766 program constitutes the exercise of a public function.

A. A Public Function Must Be Traditionally And Exclusively Performed By the State.

While private individuals or groups who are endowed with powers or functions governmental in nature may become state actors, Evans v. Newton, 382 U.S. 296, 299 (1966), not every agency or contractual relationship with the State is sufficient to cause this transformation. In Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), the Court reviewed previous holdings in which state action had been found to exist under a public function theory and observed that in each of those cases a private entity had exercised a power "traditionally exclusively reserved to the State."

Jackson, 419 U.S. at 352.[8/] That these criteria constitute prerequisites to a conclusion of state action under the public function doctrine was made clear in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), where the Court rejected the contention that the settlement of disputes between debtors and creditors is traditionally and exclusively a public function. In so doing, the Court cautioned against an unduly broad reading of earlier cases and reaffirmed the requirement that a function must be both traditionally and exclusively reserved to the State before its performance by a

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8/ The cases reviewed include Nixon v. Condon, 286 U.S. 73 (1932); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Evans v. Newton, 382 U.S. 296 (1966).

private entity would generate state action. Flagg Bros., Inc., 436 U.S. at 157-58.

Furthermore, the Court indicated that exclusivity itself exists only if a two-pronged test is satisfied. First, the public function must be "exclusively reserved to the State," as are elections of public officials. Second, the private entity must assume responsibility for the entire public function at issue, as when a political party conducts primary elections which produce "the uncontested choice of public official," Flagg Bros., Inc., 436 U.S. at 158, quoting Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring),[9/] or when a private

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9/ It is significant that the Court in Flagg focused on the fact that the Jaybird Democratic Association in Terry

(footnote continued)

company takes complete responsibility for the streets of a company-owned town, performing all necessary municipal functions, Flagg Bros., Inc., 436 U.S. at 158-59, citing Marsh v. Alabama, 326 U.S. 501 (1946). Cf. Hudgens v. NLRB, 424 U.S. 507 (1976) (shopping malls do not displace traditional, municipally-controlled forums for communication to the extent necessary to constitute state action). In sum, private activity which parallels a traditional state function or which partially performs the function

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(footnote continued)

"effectively performed the entire public function of selecting public officials." Flagg Bros., Inc., 436 U.S at 158. This focus represents a narrowing of the Court's earlier willingness to conclude state action in the delegation of "an aspect" of the elective process to private groups. Evans v. Newton, 382 U.S. 296, 299 (1966).

without wholly displacing it does not give rise to state action under the public function doctrine. McCoy, Current State Action Theories, the Jackson Nexus Requirement and Employee Discharges by Semi-Public and State-Aided Institutions, 31 Vand. L. Rev. 785, 801 (1978) [hereinafter cited as McCoy].10/

10/ This conclusion is not undermined by the finding of state action in Evans v. Newton, 382 U.S. 296 (1966), which was based upon the Court's characterization of the recreational park at issue as predominantly municipal in character and "plainly" in the public domain. The Court explained in Flagg Bros., Inc., that its earlier holding in Evans rested on a finding of "ordinary state action under extraordinary circumstances." Flagg Bros., Inc., 436 U.S. at 159 n.8. These circumstances involved the city's continued involvement in the maintenance of the park after its operation was transferred to private trustees. Id.

B. Special Education Is Not Traditionally And Exclusively Performed By the State.

Whether the asserted public function in this case is broadly defined as special education or limited to the provision of Chapter 766 education by New Perspectives School, the required components of tradition and exclusivity are lacking.[11/] Private secondary

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11/ Petitioner Rendell-Baker defines the function at issue in this case not as special education or the provision of Chapter 766 education by New Perspectives, but as public education and/or public financing. Petitioners' Brief at 18-19, 22, 24. Insofar as public education is concerned, this characterization assumes the existence of a public function, thus accepting as a premise the very question at issue in the case. Insofar as public financing is concerned, Petitioner Rendell-Baker substitutes for a public function what is merely one indicia of state action. The fact that the state "exclusively retains the power and duty to spend public funds to provide Chapter 766 education," id. at 24, is to

(footnote continued)

schools providing mainstream and special education have historically served as an alternative to public education, a role that has been both recognized and protected by this Court. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). Accord, Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring). Thus, even though education may be administered with "a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution,'" Flagg Bros. Inc., 436 U.S. at 163, that degree is simply not sufficient to render education a public

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(footnote continued)

be expected, given the public source of the financing. That fact adds nothing to the analysis required by the Fourteenth Amendment.

function for state action purposes.[12/]

Indeed, as one lower court has observed, "education, even at the primary and secondary levels, has never been a state monopoly in the United States. As a historical matter, the widescale private development of higher education in this country preceded state entry into the field by more than a century."

12/ Given the public and private components of education, Petitioner Rendell-Baker's reliance on cases involving public schools, alone, is misplaced. See e.g., Ambach v. Norwick, 441 U.S. 68 76 (1979); Foley v. Connelie, 435 U.S. 291, 297 (1978); National League of Cities v. Usery, 426 U.S. 833, 835 (1976); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Brown v. Board of Education, 347 U.S. 483 (1954). While those cases recognize that public education is a traditional governmental function, that observation has no bearing on the threshold issue presented in this case: whether education financed by the State, but provided by a private entity, is public education.

Greenya v. George Washington University, 512 F.2d 556, 561 n.10 (D.C. Cir. 1975), cert. denied, 423 U.S. 995 (1975).

Nor has the public sector played an exclusive role in the education of special needs children. To the contrary, Chapter 766 was enacted to redress the traditional non-involvement of public schools in the education of special needs children. As the First Circuit noted, "it is only recently that public school systems have assumed any responsibility for children with special needs, until a few years ago such children were routinely excluded from public schools." P.A. 22. This routine exclusion was statutorily permitted under the predecessor version of Chapter 766. See 1954 Mass. Acts 514, §5, making special

education a public responsibility only in towns where there were five or more mentally retarded children. Petitioners' Brief at 23.

Although the current version of Chapter 766 makes public financing for an educational program available to every special needs child, it is implicit in Chapter 766 that if a child's parents do not agree with the educational plan devised by the local school committee and approved at the administrative appeals level, they are free to provide their child, at their own expense, with an alternative educational program in a private school. Commonwealth v. School Committee of Springfield, 1981 Mass. Adv. Sh. 502, 514, 417 N.E.2d 408, 415 (1981). Obviously, private schools such

as New Perspectives also participate in providing publicly-funded special education. Chapter 766 and its implementing regulations allow localities to contract with private schools to provide special education for children whose needs cannot be met by programs available in public schools. Mass. Gen. Laws Ann. ch. 71B, §4 (West Supp. 1981);A. 9. 603 Code Mass. Reg. §28, Paragraphs 804.0-804.6 (1979);A. 14. School Committee of Springfield, 1981 Mass. Adv. Sh. at 505, 417 N.E.2d at 410.[13/] These examples of private involvement in special edu-

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13/ These provisions grant official recognition to the private status of schools such as New Perspectives which

(footnote continued)

cation demonstrate that Massachusetts and its political subdivisions have neither traditionally nor exclusively appropriated the responsibility to educate special needs children.

While the role of public schools in the education of special needs children has been neither traditional nor exclusive, in recent years public schools have assumed a greater share of this responsi-

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(footnote continued)

contract to provide Chapter 766 education. Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981). P.A. 17. In doing so, the provisions support the notion that a private school is not automatically rendered a public entity for state action purposes by virtue of performing a statutorily-mandated function. See e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Berrios v. Inter American University, 535 F.2d 1330, 1332 (1st Cir. 1976).

bility. Maximized public involvement is "impliedly required" by Chapter 766 and "explicitly mandated" by the statute's implementing regulations, with private school placements "permitted only as a necessary alternative." School Committee of Springfield, 1981 Mass. Adv. Sh. at 506, 417 N.E.2d at 410. Given this presumption against private placements, schools such as New Perspectives provide special education to relatively few Chapter 766 students. Id. at 507 n.8, 417 N.E.2d at 411 n.8.[14/]

14/ This limitation upon private placements safeguards against the use of private schools as vehicles for avoiding Fourteenth Amendment responsibilities. Thus, this case is distinguishable from decisions involving the evasion of equal protection guarantees through assistance to private entities. E.g., Gilmore v. City of Montgomery, 417 U.S. 556 (1974);

(footnote continued)

Accordingly, there exists no possibility that private schools will displace public schools in the provision of Chapter 766 education or exclusively assume responsibility for educating special needs students. New Perspectives therefore stands in a different posture with respect to Chapter 766 education than did the Jaybird Party in Terry v. Adams, 345 U.S. 461 (1953), with respect to the election of public officials, or the

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(footnote continued)

Evans v. Newton, 382 U.S. 296 (1966); Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964); Smith v. Young Men's Christian Association of Montgomery, 462 F.2d 634 (5th Cir. 1972), aff'd as modified, id., 316 F. Supp. 899 (M.D. Ala. 1970). See McCoy, 31 Vand. L. Rev. at 805(2); Burke and Reber, State Action, Congressional Power And Creditors' Rights: An Essay On the Fourteenth Amendment, 46 S. Cal. L. Rev. 1003, 1065 (1972).

Gulf Shipbuilding Corporation in Marsh v. Alabama, 326 U.S. 501 (1946), with respect to the performance of municipal functions.

Insofar as the student body of New Perspectives is concerned, there admittedly existed a relatively high proportion of Chapter 766 students during the 1976-1977 school year.[15/] Students, however, may also come to the school through private referrals or on their own initiative. P.A. 4. Thus, New Perspectives, like other private schools participating in the Chapter 766

15/ Chapter 766 students did not constitute the entire student population. Seven of the fifty students who comprised the student body that year were funded by the Massachusetts Division of Youth Services and the Department of Mental Health. J.A. 90.

program, has an identity independent of its participation in that program.[16/]

16/ This independent identity is reinforced by the fact that the regulations to which the school is subject would apply equally "to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds." Rendell-Baker v. Kohn, 641 F.2d 14, 25 (1st Cir. 1981). P.A. 20. Surely such a limited contract would not transform a private school into a state actor.

The school's public funding likewise presents no barrier to its status as an entity independent of the government. Chapter 766 funding is considered as "a matter of law" to flow to individual special needs students and only secondarily and indirectly to the private school which educates them. See School Committee of Springfield, 1981 Mass. Adv. Sh. at 518, 417 N.E. 2d at 417. The funding for Ms. Rendell-Baker's position is similarly inconsequential, since it originated from the federal government and therefore must be discounted for state action purposes. See Molinar v. Western Electric Co., 525 F.2d 521, 532 (1st Cir. 1975), cert. denied, 424 U.S. 978 (1976). Perhaps for these reasons

(footnote continued)

Given this independent identity, a conclusion that New Perspectives is a state actor which performs a public function in providing publicly-financed special education would require that all private schools which contract to provide special education under the Chapter 766 program be considered state actors, regardless of the size of their Chapter 766 population. Such a result, in turn, would enervate the limitations of tradition and exclusivity which this Court has imposed upon the public function doctrine and therefore endanger the principle of private autonomy which underlies those limitations.

(footnote continued)

Petitioner Rendell-Baker does not rely upon government regulation and funding as grounds for urging a conclusion of state action.

II. ASSUMING NEW PERSPECTIVES DOES PERFORM A PUBLIC FUNCTION, THE TERMINATION OF MS. RENDELL-BAKER DID NOT INVOLVE AN EXERCISE OF THAT PUBLIC FUNCTION.

Assuming, arguendo, that New Perspectives does perform a public function in providing special education to students placed and funded by the Commonwealth, the school does not become a state actor for all purposes. Its status as a state actor is limited to those matters which involve an exercise of the public function. Since the termination of Ms. Rendell-Baker is unrelated to the school's provision of Chapter 766 education, the school was not a state actor with respect to that termination.

The Court's mode of analyzing state action issues involving the delegation of governmental obligations is most explicitly set out in Smith v. Allwright, 321 U.S. 649, 663 (1944), where the Court concluded that state action did exist with respect to the delegation to the Democratic Party of the State's responsibility to conduct primary elections. Rather than subject the Party to constitutional constraints with respect to all of its activities, the Court concluded that state action existed only "insofar as [the Party] determines participants in a primary election." Id. See also Terry v. Adams, 345 U.S. 461 (1953). By limiting its holding to matters involving the actual electoral process, the Court

made clear that the specific action challenged must itself involve the exercise of a delegated governmental responsibility in order for constitutional safeguards to apply. Similarly, in Evans v. Newton, 382 U.S. 296 (1966), the Court concluded that state action existed when a municipal park was transferred to private trustees, suggesting that the operation of the park was a function governmental in nature. It is significant that the specific action challenged in Newton -- restriction of the park to whites -- related directly to the operation of the park and, hence, to the public function.

The Court's so-called "municipal-function" case, Marsh v. Alabama, 326 U.S. 501 (1946), conforms to this

analytical approach. In that case state action was determined to exist in the context of a prohibition against the distribution of religious literature in the business district of a privately-owned town. The public function at issue in Marsh was the responsibility for operating an entire town. Marsh, 326 U.S. at 508-509. As with the operation of any municipality, that responsibility includes the provision of public areas for the exercise of free speech, whatever its content. Accordingly, the distribution of religious literature in the town's business district involved the exercise of a public function.

If one assumes that the Commonwealth has delegated a public function to New Perspectives, the foregoing cases make

clear that the school would be subject to constitutional provisions only as to matters relating to the school's responsibility to provide special education to students placed and funded by the Commonwealth. It could not be a state actor as to collateral matters which do not bear directly on the school's responsibility to provide publicly-funded and regulated special education. Indeed, Petitioner Rendell-Baker does not challenge this proposition, suggesting instead that her termination related directly to the school's performance of its public education responsibilities. Petitioners' Brief at 20 n.22, 35-38. Under this formulation of the case, the Court must decide whether the termination of a teacher for

open advocacy of student participation in a private school's general personnel matters is an activity directly related to the school's contracted obligation to provide special education.

The First Circuit concluded that the school was not subject to constitutional constraints in terminating Petitioner Rendell-Baker. Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981); P.A. 1-26. Its conclusion stemmed in part from a conviction that while the school might perform a public function with respect to its student body, it did not perform a public function in its contractual dealings with its faculty. Id. at 26; P.A. 23. Cf. Marsh v. Alabama, 326 U.S. 501 (1946) (existence of public areas in the town benefits individuals electing to exercise their right to free speech).

In other words, the First Circuit refused to conclude that state action existed under the public function doctrine because the required nexus between the asserted public responsibility for providing special education and the termination of the plaintiff was lacking.[17/] Cf. Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (detention of children by private child care institution constituted exercise of delegated public function); United

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17/ As one commentator has observed, the increasing reluctance of courts to find state action has resulted from a shift in the identity of plaintiffs from outside consumers of institutional services to employees challenging the internal management of private institutions. McCoy, 31 Vand. L. Rev. at 790.

States v. Wiseman, 445 F.2d 792 (2d Cir. 1971), cert. denied 404 U.S. 967 (1971) (delivery of false affidavits of service constituted exercise of public process-serving function).

This lack of nexus accurately reflects the Smith v. Allwright mode of analysis for two reasons. First, as the First Circuit noted, the school's authority over its faculty derives from a contractual relationship of employment, not from state law. Rendell-Baker v. Kohn, 641 F.2d at 26; P.A. 23. Given this derivation, personnel decisions in general are distinct from decisions involving the student body which relate to education matters.

Second, the underlying reason for the plaintiff's termination -- advocating student participation in faculty appointments and terminations[18] -- was itself a personnel matter rather than an issue bearing directly on the school's provision of special education. In this regard the termination of Petitioner Rendell-Baker may be contrasted to the dismissal of a teacher for conduct or speech in the classroom,[19] matters

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18/ See pp. 9-10 supra.

19/ Cf. McCoy, 31 Vand. L. Rev. at 823 ("A certain amount of freedom of speech for the teacher in the classroom might be judicially imposed on the private school administration, not as a matter of the teacher's fourteenth amendment rights but as a part of the students' fourteenth amendment interests in their state-aided education.").

which arguably could be related to a school's special education responsibilities.[20] Thus, the First Circuit's holding lies squarely within the analytical framework established by

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20/ The Court need not confront the potential breadth of this protected private speech because Petitioner Rendell-Baker's support of student participation in faculty appointments and terminations falls clearly outside its protection, notwithstanding her reliance upon Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960). While those cases recognize a close relationship between teacher free speech and the educational process, they do so in the context of a public school situation in which the existence of state action was not at issue. Reliance upon those holdings as a basis for making a preliminary finding of state action would transform this Court's expansive protection of public speech into a basis for applying First Amendment guarantees in private contexts. See Part III infra.

Smith v. Allwright, 321 U.S. 649 (1944), even though a resolution of state action in other types of actions might not.

Nor is it coincidental that the First Circuit concluded that there was an insufficient relationship for state action purposes between the Commonwealth's involvement in the operation of New Perspectives and the termination of Petitioner Rendell-Baker. Rendell-Baker v. Kohn, 641 F.2d at 27-28; P.A. 25-26.[21] To the contrary, it is logical that the state would not be extensively involved

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21/ The necessity for a nexus between the State and the challenged action of the regulated entity as a prerequisite to state action is clearly articulated in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

in matters unrelated to the school's alleged public function of providing special education. Cf. McQueen v. Druker, 438 F.2d 781, 784 (1st Cir. 1971) ("The stronger posture of government supervision present in this case is not unrelated to the fact that the government has chosen to attract the participation of private persons in carrying out a specific governmental purpose.").

A review of the statutory and regulatory provisions involving Chapter 766 reveals no substantive or procedural guidelines with respect to teacher terminations other than an open-ended requirement that schools should maintain written policies on personnel matters including dismissals. A. 2-15; P.A. 5-6, 20-21. Likewise, Committee on Criminal

Justice provisions which accompany funding for Ms. Rendell-Baker's position require limited approval of staff hiring and salary increases, but not of staff terminations. P.A. 7-825; J.A. 92-93, 105-107. The First Circuit specifically found nothing authorizing the Committee on Criminal Justice to oversee the discharge of an employee funded by the Committee, Rendell-Baker v. Kohn, 641 F.2d at 27, P.A. 25, and on this basis discounted Ms. Rendell-Baker's assertion that a Committee official had undertaken to oversee the manner in which the school discharged her, id. at 27-28; P.A. 25-56.

The foregoing analysis demonstrates that while New Perspectives' provision of special education may be funded and regulated by public sources, the govern-

ment has maintained a hands-off policy regarding the school's personnel practices. This non-involvement demonstrates, in turn, that even if the provision of special education pursuant to Chapter 766 constitutes a public function, the termination of Ms. Rendell-Baker is not sufficiently related to the exercise of that public function to transform New Perspectives into a public entity for state action purposes.

III. THE BALANCING OF COMPETING INTERESTS IS NOT AN APPROPRIATE STANDARD FOR THE THRESHOLD DETERMINATION OF STATE ACTION.

Citing an alleged lack of rational framework for determining when state action is present, Petitioners' Brief at 33, and the inadequacy of those guidelines previously enunciated by the Court, id. at 29, Petitioner Rendell-Baker would have the Court take this opportunity to disavow the traditional analysis of state action[22/] in favor of an analysis which calls for a balancing of those interests competing for protection

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22/ See also, Glennon and Nowak, A Functional Analysis of the Fourteenth Amendment State Action Requirement, 1976 Sup. Ct. Rev. 221.

in any given case.[23/] This proposed analysis, raised for the first time in Petitoners' Brief, is intended to set "appropriate limits to the scope of the Fourteenth Amendment," id. at 26, and would supplant state action theory,

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23/ Petitioners formulate their theory of state action as follows:

> Once the court determines that substantial indicia of state action are present, instead of trying to decide if the case is more like one case or another, it can move on to the less mechanical and more meaningful task of sorting out and weighing the competing interests at stake, to determine which is more deserving of protection upon the facts of the particular case at hand. Petitioners' Brief at 33-34.

Petitioners make it clear that while "substantial indicia of state action" may be present, the test should be utilized "whether or not any specific previously established guideline for determining state action is satisifed." Id. at 31.

as heretofore articulated by the Court.[24/] Respondents Highgas and Bellotti submit that balancing the asserted interests prior to a determination of the presence of state action is inappropriate and inconsistent with the principles underlying the Fourteenth Amendment.

The Court has clearly indicated over the years that in order to determine whether challenged activity constitutes a denial or deprivation of rights protected by the Fourteenth Amendment,

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24/ Prior proceedings in this case suggest that certiorari was sought in order to further define the public function doctrine in the context of a narrow set of facts. See Petition for Writ of Certiorari at 18. Petitioners' argument in Part IIB of their brief, however, is not confined to that subject.

the initial inquiry is necessarily whether there is state action. See, e.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 n.4 (1978). This inquiry is required by the "essential dichotomy set forth in the Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974), quoting Shelly v. Kraemer, 334 U.S. 1, 13 (1948). Accord, Moose Lodge v. Irvis, 407 U.S. 163, 172 (1972). The distinction between public and private conduct was first enunciated in The Civil Rights Cases, 109 U.S. 3 (1883), and has been subsequently

reaffirmed. See Flagg Bros., Inc., 436 U.S. at 156; Jackson, 419 U.S. at 349; Moose Lodge, 407 U.S. at 172; Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961); Shelly v. Kraemer, 334 U.S. at 13.[25/] Thus, when the challenged activity is that of a private person or entity, the Fourteenth Amendment requires a preliminary determination that the person or entity may be regarded as a state actor. See Part I supra. Only when state action is present must a court undertake the "ultimate inquiry," Flagg Bros., Inc.,

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25/ See also L. Tribe, American Constitutional Law, §18-2 at 1149 (1978) (by exempting private action from the reach of the constitution's prohibitions, [the state action requirement] stops the constitution short of pre-empting individual liberty . . .).

436 U.S. at 155 n.4, whether individual rights protected by the Fourteenth Amendment were abridged.[26/]

The balancing of competing interests presented in a particular case is appropriate only after the initial determination of state action is made and as part of the "ultimate inquiry" which a court must then undertake. See, e.g., Marsh v. Alabama, 326 U.S. 501, 509 (1946).[27/] See also Mt. Healthy City

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26/ Thus, in this case the district court assumed, for purposes of determining whether state action was present, that Ms. Rendell-Baker "was dismissed as a result of a legitimate exercise of her free speech and that her dismissal was not accompanied by the procedural safeguards which would be required if the action were attributable to the State." P.A. 29.

27/ While Petitioner Rendell-Baker cites Marsh in favor of her proposed

(footnote continued)

Board of Ed. v. Doyle, 429 U.S. 274, 284 (1977); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The balancing test as propounded by Petitioner Rendell-Baker would lead to simple boot-strapping. Applying this test to the instant case, Petitioner would have the answer to the threshold inquiry (whether the conduct of the school and its Director can properly be attributed to the Commonwealth) subsumed into the second inquiry (whether Petitioner Rendell-Baker's dismissal was as the result of her legitimate exercise of free speech and, therefore, a violation of the

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(footnote continued)

analysis, it is important to note that the Court's balancing of competing interests in that case occured only after state action had been found.

Fourteenth Amendment). The logical result of the application of such a test, in some instances and perhaps in the instant case, might well be a determination of a Fourteenth Amendment violation where there are present (1) "substantial indicia" of state action, although not necessarily sufficient indicia to alone justify a determination of state action, and (2) a "substantial" impairment of a fundamental right, with no countervailing interest. Thus, "whether or not any specific, previously established guideline for determining state action is satisfied," Petitioners' Brief at 31,[28/] a balancing of interests may

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28/ See n.23 supra.

result in a finding of constitutional violation.[29/] This, it is submitted, contravenes the firmly established principle that the Fourteenth Amendment does not apply to private conduct and would only serve to obscure that Amendment's "essential dichotomy" between public and private conduct. Whether conduct is private or may be attributed to the State is a determination which must be made

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29/ Petitioners assert that their proposed analysis will provide "a rational framework of decision," Petitioners' Brief at 33, and, presumably, guidance in making state action determinations. A test, however, the application of which results in "identical indicia of state action" warranting "a determination of state responsibility under some circumstances but not others," id. at 32, would not lead to substantial certainity as to the standards by which state action may be found.

apart from a consideration of the interests which each party asserts.30/

It may be that "formulating an infallible test of state action is an impossible task." Reitman v. Mulkey, 387 U.S. 369, 378 (1967). "[W]hether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." Jackson, 419 U.S. at 349-50. Accord, Moose Lodge, 407 U.S. at 172; Burton, 365 U.S. at 723. It is submitted,

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30/ This is not to say that the determination of state action is to take place in a vacuum. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722. Thus, each case must be analyzed on its own facts in order to determine whether state action is present. This factual analysis, however, is distinguishable from a balancing of interests of the parties.

however, that the Fourteenth Amendment requires that an answer be found. The appropriate test to be applied to these facts is clear: there is state action which may be attributable to a private actor only (1) if there has been a delegation of a public function which is traditionally and exclusively performed by the State, Flagg Bros., Inc., 436 U.S. at 157-59; Evans v. Newton, 382 U.S. 296, 299 (1966), and (2) if the challenged conduct involves an exercise of that public function, Jackson, 419 U.S. at 351. This "sovereign-function doctrine" is one which Justice Rehnquist, writing for the majority in Flagg Bros., Inc., has said exists within "carefully confined bounds." Flagg Bros., Inc., 436 U.S. at 163. The Court should not

accept the invitation extended by Petitioner Rendell-Baker to use this case as an opportunity to articulate a wholly new doctrine of Fourteenth Amendment analysis, particularly a doctrine which would sweep within the ambit of the Amendment categories of private conduct previously excluded from its scope and would do so on the basis of a subjective balancing test.

CONCLUSION

This judgment of the Court of Appeals in Rendell-Baker, affirming the judgment of the district court, should be affirmed.

Respectfully submitted,

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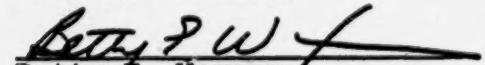
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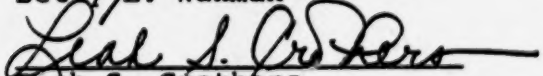
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